

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Level 3 Communications LLC's Petition for)	
Forbearance Under 47 U.S.C. § 160(c) and Section 1.53)	WC Docket No. 03-266
of the Commission's Rules from Enforcement of)	
Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b))	

COMMENTS OF MCI

WorldCom, Inc. d/b/a MCI ("MCI") hereby submits its comments on Level 3 Communications LLC's ("Level 3") *Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)* ("Petition") in the above-captioned proceeding.

MCI has a direct and immediate stake in the outcome of this proceeding. MCI owns, operates and maintains one of the largest IP communications networks in the world. As an industry leader in the Internet sector, MCI has been active with respect to the development and implementation of Voice over Internet Protocol ("VoIP") and other IP-based services in the United States and beyond.

I. INTRODUCTION

Level 3 petitions the Commission to forbear from any application of the existing irrational access charge regime to nascent broadband VoIP communication services that intersect the traditional public switched telephone networks ("PSTN"), at either the origination or termination ends of the VoIP communication.¹ MCI believes that these enhanced services have

¹ Level 3 also seeks forbearance on certain PSTN-PSTN traffic that is incidental to the provision of such VoIP services. Level 3 makes clear that its Petition does not address the

always been exempt from the access charge regime. Certain incumbent local exchange carriers (“ILECs”) nevertheless have claimed that such VoIP communications are subject to access charges. It therefore would be beneficial for the Commission to re-affirm its position and resolve any regulatory uncertainty on this point.

The Commission should make clear that the intersection between VoIP traffic and the PSTN should be managed under the terms of interconnection agreements between carriers on a “minute-is-a-minute” basis, regardless of the geographic end-points of the calling and called parties.² The Commission also should confirm that any ILEC efforts at self-help (*e.g.*, billing for access charges, or refusing to accept VoIP traffic over local interconnection trunks) would be in violation of that policy. We further maintain that the Commission ought to make this policy permanent.

Finally, the growth of VoIP services, and the unfortunate but predictable response of the ILECs to block that growth, should lead the Commission promptly to establish a rational intercarrier compensation policy. Only by resolving the policy questions raised both in this Petition and in the FCC’s current *Inter-carrier Compensation NPRM* proceeding will the Commission rationalize the treatment of access charges across all communication platforms.³

“phone-to-phone” type of VoIP service that is the subject of AT&T’s separate petition. *See In re AT&T Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC filed Oct. 18, 2002) (“*AT&T VoIP Proceeding*”).

² See Petition at 10.

³ *See In re Developing a Unified Inter-carrier Compensation Regime*, 16 F.C.C.R. 9610 (2001) (“*Inter-carrier Compensation NPRM*”).

II. CURRENT FCC POLICY: ACCESS CHARGES DO NOT APPLY TO VoIP

It has been Commission policy for almost 20 years that enhanced services providers (“ESPs”), including Internet service providers, are not subject to carrier access charges.⁴ Although commonly referred to as an “exemption” for ESPs, it is more accurate to say that the Commission has always classified ESPs as “end users” of telecommunications services. Under the access charge regime, end users do not pay the same charges that are applicable to “carriers” purchasing exchange access services.

The rationale behind this treatment of ESPs is fully elaborated in the Commission’s *Computer Inquiry* rules.⁵ In those decisions, the FCC drew a distinction between “basic” transmission services, which are subject to Title II common carriage regulation, and “enhanced” information services that ride over those basic services, which are largely unregulated. Under this dichotomy, ESPs are *providers* of information services, and *users* of telecommunications services. Thus, assertions by the ILECs that ESPs (including VoIP providers) should be subject to access charges are deeply inconsistent with the Commission’s *Computer Inquiry* regime.

To a significant extent, the Telecommunications Act of 1996 (“Act”)⁶ incorporated the policies and rules adopted in the *Computer Inquiry* regime into the FCC’s basic governing statute. Thus, the Act defined “exchange access” as the “offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll

⁴ See *In re MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶¶ 76-77 (1983); *In re Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 F.C.C.R. 2631, ¶ 2 (1988).

⁵ See, e.g., *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 F.C.C.2d 384, ¶ 96 (1980), *on recon.*, 84 F.C.C.2d 50 (1980), *further recon.*, 88 F.C.C.2d 512, *aff’d sub nom. Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (“*Computer Inquiry*”).

⁶ Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), codified at 47 U.S.C. § 151 *et seq.*

services.”⁷ And it defined “information service” as a capability that is offered “via telecommunications.”⁸ As the Commission already has found, pursuant to these definitions ESPs do not originate or terminate telephone toll services, and thus do not provide exchange access services. Instead, ESPs provide information services over facilities provided by ILECs and other carriers, which in turn provide exchange access services to the ESPs.

The Commission properly credits its policy of excluding ESPs from excessive per-minute access charges with aiding in the rapid growth of the online world, and eventually the Internet itself.⁹ The Commission also has found that the “end user” status of information services currently extends to all forms of Internet telephony services.¹⁰

To date, many (but not all) of the ILECs nevertheless have taken the position that Internet voice traffic that connects to the PSTN is inter-exchange telecommunications service that should be subject to access charges.¹¹ This is the same position that the ILECs have urged over the last 20 years for all varieties of online and Internet traffic -- and the Commission has correctly and consistently rejected it. Instead, the FCC has concluded that it is sound policy to allow this nascent, innovative form of communication to develop without having to bear the burden of

⁷ 47 U.S.C. § 153(16).

⁸ *Id.* § 153(20).

⁹ See *In re Access Charge Reform*, 12 F.C.C.R. 15982, ¶ 344 (1997) (“*Access Charge Reform Order*”).

¹⁰ See, e.g., *In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11501, ¶ 91 (1998) (“*Report to Congress*”) (noting that the question whether to subject phone-to-phone IP telephony services to access charge regime is a “difficult and contested issue[]” to be faced in the future). See also *id.* at 11623 (Powell, Commissioner, concurring) (distinctions between voice and data are “difficult if not impossible to maintain” and a decision to impose traditional regulation on “innovative new IP services” could “stifle innovation and competition in direct contravention of the Act”).

¹¹ See, e.g., Comments of Verizon, WC Docket No. 03-211 (FCC filed Oct. 27, 2003); but see Comments of SBC Communications, Inc., WC Docket No. 03-211 at 2 (FCC filed Oct. 27, 2003) (“Commission should adopt a clear and broad federal framework designed to protect Internet-based services from common carrier-type regulation under the Communications Act.”).

participating in an inefficient and irrational access charge regime. Any other rule, if applied to VoIP offerings using the public Internet, would be tantamount to a tax on the Internet, which the Commission has steadfastly opposed. While the Commission's rules in this area (as they apply specifically to VoIP) maybe be interim in nature, that status does not mean the ILECs are free simply to engage in self-help and violate them at will. Accordingly, by granting Level 3's Petition, the Commission will make it clear to the ILECs that VoIP services are not subject to access charges, at least until the Commission rationalizes the broken intercarrier compensation system and addresses the overarching scope of VoIP-related regulations in the recently announced *VoIP NPRM*.¹²

Finally, MCI agrees with Level 3 that any failure by the Commission to stop the ILECs from unilaterally imposing access charges on VoIP services will create great uncertainty at the federal and state levels, and will inevitably deter the successful and complete deployment of VoIP applications. These applications hold out the promise of great consumer benefit, allowing the delivery of voice and data in efficient and innovative ways. Without forbearance, the Commission's current policies that favor the development of VoIP and other nascent communication technologies will be stymied.

III. THE COMMISSION SHOULD PROMPTLY RESOLVE ALL OF THE OUTSTANDING VoIP-RELATED DOCKETS

MCI applauds the Commission's long-awaited order granting the Pulver.com petition.¹³ But this is only a first step towards clarifying the VoIP regulatory environment. Many open

¹² See News Release, FCC, *FCC Moves to Allow More Opportunities for Consumers through Voice Services Over the Internet* (Feb. 12, 2004) ("*VoIP NPRM*").

¹³ See News Release, FCC, *FCC Rules that Pulver.com's Free World Dialup Services*

proceedings that relate to VoIP (e.g., this Petition, the Commission's two rulemaking efforts regarding Intercarrier Compensation and VoIP, and two pending petitions by AT&T and Vonage) still need prompt resolution by the Commission.¹⁴ The appropriate regulatory treatment of all types of VoIP services should no longer be left for another day.

We share Level 3's view that the Commission ought to reaffirm and codify its previous conclusion that it would be unwise to subject novel Internet applications, including voice applications, to the burdens of the present access charge regime. As the Commission already has concluded, that compensation system is not cost-based, for its charges do not reflect in any rational way the manner in which those costs are incurred, or the true amount of those costs.¹⁵ The disparate treatment of intra-state access, inter-state access, reciprocal compensation for local traffic, and the access provided CMRS carriers further adds to the irrationality of the present regime. For these reasons, as well as others, the access charge system does not send market participants the right economic signals. Instead, it creates regulatory arbitrage opportunities that serve no public purpose. Despite Commission tinkering with some of its worst features, the current access charge regime remains an embarrassment, and it ought to be completely overhauled.

The more difficult question is what intercarrier compensation scheme should replace the existing hodgepodge of a system. The Commission's on-going *Intercarrier Compensation NPRM* proceeding is considering the right questions, as it seeks to establish a framework that

Should Remain Free from Unnecessary Regulation (Feb. 12, 2004); *In re Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27 (Feb. 19, 2004) ("*Pulver.com Order*").

¹⁴ See *Intercarrier Compensation NPRM*; *VoIP NPRM*; *AT&T VoIP Proceeding*; *In re Vonage Holdings Corp.*, WC Docket No. 03-211 (FCC filed Sept. 22, 2003).

¹⁵ See, e.g., *Access Charge Reform Order* ¶¶ 344-345.

would apply the same compensation principles to all forms of traffic exchange. Those rules should be formulated to allow competition to develop between and among IP voice services and plain old telephone service (“POTS”) services in a manner that is unbiased by inefficient rules that disparately affect the different types of service. The rules should respond to the fact that categories like “local” and “long-distance,” or “voice” and “data,” have become historical artifacts. Rules that draw such artificial distinctions only perpetrate regulatory distortions that the Commission needs to eliminate.

Artificial rules encourage arbitrage and create regulatory conundrums. While the Commission has at times been sensitive to these problems, the Commission occasionally strays and generates its own roadblocks in the path of technological progress. For example, in the *Broadband Framework* proceeding, at the behest of the ILECs, the Commission tentatively adopted conclusions that would set in stone as regulatory “definitions” a set of rules that irrationally discriminate among services.¹⁶ If adopted, these policies would require regulated access when competitive carriers need the ILEC lines for traditional voice services carried over traditional voice protocols, but permit the ILECs to deny access over those same lines when such carriers need to originate or terminate calls using Internet Protocol. The Commission’s approach would have this irrational effect without regard to whether there was any real need for the access when provided in the first instance, or when withheld in the latter instance. Rules based on irrelevant service or technical characteristics further no rational policy goal, and in fact cause great harm to consumers.

¹⁶ See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019 (2002) (“*Broadband Framework*”); see also *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002), reversed by, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

A regime that allows the ILECs to provide a full bundle of innovative IP-based voice and data applications using their own bottleneck facilities, while limiting competitors' access to those same facilities to only the provision of POTS voice service, is a broken and inconsistent system. Over time, the inevitable result of such a regime will be the re-monopolization of transmission services, as well as all of the downstream services that rely upon those transmission services. By denying competitors access to bottleneck broadband facilities upon reasonable terms, the Commission will damage the long-term growth of nascent IP-based applications, which adversely impacts both consumers and the national economy.

Under the current regime, it is virtually impossible to categorize Internet voice applications -- which potentially is a substitute for POTS service, and yet at the same time is an unregulated Internet application that offers far greater potential than POTS services. The Commission recently clarified matters to some extent by reiterating that so-called "computer-to-computer" VoIP applications are not subject to access charges.¹⁷ For the same reasons that the Commission granted the *Pulver.com* petition, it should promptly grant this forbearance Petition and make clear that "computer-to-phone" VoIP applications similarly offer a new range of innovation over enhanced platforms. Such VoIP services therefore should be classified as "information services," which are not subject to access charges. A prompt ruling to that effect would preserve the status quo and allow innovation to continue while the Commission more broadly considers such regulatory classifications and related issues in the *Intercarrier Compensation NPRM* and the recently announced *VoIP NPRM*.

¹⁷ See *Pulver.com Order*.

IV. CONCLUSION

For these reasons, the Commission should grant Level 3's Petition, and exercise complete forbearance of all interstate and intrastate access charges on the types of VoIP services described in the Petition. The Commission also should move expeditiously to conclude the current *Intercarrier Compensation NRPM* and *VoIP NPRM* proceedings, and establish a rational compensation regime that eliminates the gross inefficiencies that plague the entire telecommunications industry. Finally, the Commission should reconsider the long-term implications of its past suggestions that competitors should not have reasonable access to the ILECs' bottleneck broadband facilities.

Respectfully submitted,

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